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IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

H. EDWARD TICKEL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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16 pp

QUESTION PRESENTED

Were petitioner's Fifth Amendment right to due process of law and Sixth Amendment right to be confronted with the witnesses against him violated when two critical government witnesses buttressed their testimony by referring to polygraph examinations and the trial court refused to grant a defense requested mistrial?

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The petitioner, H. Edward Tickel, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on July 31, 1984.

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OPINION BELOW

A copy of the unpublished Opinion and Judgment, issued by the United States Court of Appeals for the Fourth Circuit on July 31, 1984, is reproduced and attached as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on July 31, 1984. Jurisdiction of this Court to issue a writ of certiorari is found in 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:
No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . .

United States Constitution, Amendment VI:
In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .

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STATEMENT OF THE CASE

On November 22, 1982, petitioner H. Edward Tickel, Jr., a career F.B.I. agent who wore the same badge his father had worn for twenty years, was indicted by a Federal Grand Jury in the Eastern District of Virginia in Criminal No. 82-269-A and charged with two counts of interstate transportation of stolen property (18 U.S.C. §2314), one count of income tax evasion (26 U.S.C. §7201), one

count of making and subscribing false income tax returns (26 U.S.C. §7206), and one count of false statement (18 U.S.C. §1001).

Three days earlier, on November 19, 1982, petitioner had been indicted by a Federal Grand Jury in the District of Columbia in Criminal No. 82-343 and charged with one count of false statement (18 U.S.C. §1001), four counts of subornation of perjury (18 U.S.C. §1622), and two counts of obstruction of justice (18 U.S.C. §1503). Petitioner's unopposed motion to transfer and consolidate Criminal No. 82-343 with the Virginia indictment was granted by the Honorable Barrington L. Parker. Once transferred to Virginia, that indictment became Cr. No. 83-11-A, and was joined for trial with Criminal No. 82-269-A.

A trial by jury on the twelve counts commenced March 1, 1983, the Honorable James Cacheris presiding.

Although there were some collateral issues raised by two tax related charges, by and large the trial below revolved into a swearing match between a peripathetic diamond salesman, John Stout, as corroborated by his employer, Kenneth Kaufman and petitioner H. Edward Tickel, one of the most highly decorated and accomplished agents in the history of the FBI.

The nub of the government's case was that on December 1, 1977, Tickel stole $200,000 worth of jewelry from John Stout. According to the evidence, John Stout travelled through South Carolina, North Carolina and Virginia selling jewelry and diamonds for the Shiman Corporation.

On November 30, 1983, John Stout arrived in Lexington, North Carolina, to do business with a jewelry store owned by Bruce Hayes. Stout had known Hayes for several years, and considered him a close and trustworthy friend.

Stout testified that on the morning after his arrival in Lexington he went to Hayes' store. As was his general practice, overnight he had left his jewelry in valises in Hayes' locked vault. On this particular morning he transacted business with Hayes and then left the store shortly after 10:00 a.m. Stout swore that although his intention was to first visit another jewelry store 15 miles to the west in Salisbury, and then make his way south to Rockingham, he left virtually all of his jewelry in the valises in Hayes' jewelry store. A North Carolina State Trooper later testified that one could drive directly from Lexington to Salisbury to Rockingham, thus making Stout's purported travel plans appear illogical.

Stout returned to the Hayes' store an hour later in a highly agitated state. Stout approached Hayes, asking the whereabouts of his valises. Stout was told by Hayes and several employees of their clear and distinct recollection that he had taken the valises with him, as was his general practice after concluding his business with one jewelry store and departing for another one.

Stout insisted on a search of the Hayes' store, which proved fruitless. Hayes then called the police, and, when Stout reported to them the alleged theft of the Shiman jewelry, Stout himself became their principal suspect. Stout acknowledged that unless the jewelry was stolen from either a locked vault or directly from him, the insurance company may not have reimbursed Shiman for its loss. As it was, based on Stout's story the insurance company paid the Shiman Corporation's claim of loss. It was during intensive cross-examination of Stout about his possible motives for stealing the jewelry and diamonds that he blurted out that the insurance company had paid the claim only aftrer he had passed a polygraph. A defense request for a mistrial was denied. Later, still in the govern-

ment's case, Stout's employer at Shiman Corporation, Kenneth Kaufman, also stated that Stout had passed a polygraph. In the bench conferences that followed both incidents the government acknowledged that it had not warned either witness to avoid reference to Stout's polygraph examination. A defense request for a mistrial was denied after the second reference by Kaufman to the Stout's polygraph.

The case against Tickel was circumstantial in nature. The government established that Tickel and jeweler Bruce Hayes were longtime friends, and that during the evening of November 30, 1977, Tickel flew to Charlotte, North Carolina, rented a car, and returned to Washington, D.C., the next day. Several friends and a former girlfriend of petitioner testified that on a few occasions from 1978 to 1982 he either sold or gave them diamonds or rings. Many of those rings were identified as being similar to ones that were supposed to be in Stout's inventory on December 1, 1977.

Tickel denied all the charges. Several high ranking FBI agents testified that Tickel had one of the most dangerous and sensitive jobs in the bureau, and he performed it with unparalleled skill and integrity. Specifically, the jury learned that for several years Tickel was a central figure in the government's war against the Mafia. Tickel was a consummate lockman, and in the FBI's biggest cases involving people like mob boss Carlos Marcello in New Orleans, Tony Scotti in Long Island, and Roy Williams and Alan Dorfman in Chicago, it was Tickel who made the surreptitious entries that allowed the FBI government to place "bugging" devices and eventually prove their cases in court.

The character witnesses testified that Tickel, if he were corrupt, could have made a fortune by disclosing the ex-

istence of the bugs to the various Mafia targets. None of them had any doubt but that Tickel's honesty and integrity were unblemished.

Through Tickel and other witnesses the jury learned that Tickel's father had been a career FBI agent, and passed his badge on to his son. Other members of the Tickel family were in the jewelry business, and petitioner himself worked in an uncle's jewelry store from 1963 to 1966 before becoming an agent. According to Tickel, and corroborated by other family members, his uncle gave him several diamonds shortly after the uncle sold the store.

Petitioner acknowledged knowing John Stout, testifying that on November 21, 1977, he traded some of his diamonds to Stout for several pieces of jewelry, which Tickel felt he could resell more easily than diamonds. Tickel readily admitted being in North Carolina on December 1, 1977, testifying that he had learned through Bruce Hayes the day before that Stout wanted to meet with him again in order to purchase some of his other diamonds. After Tickel arrived, Stout changed his mind, and Tickel returned to D.C.

In regard to the various jewelry gifts or transactions chronicled earlier, Tickel testified that the rings and diamonds in question were either given to him by his uncle or were the result of the trade with Stout on November 21, 1977. On March 21, 1983, the jury returned verdicts convicting petitioner of one count of interstate transportation of stolen property (Count 2 of Criminal No. 82-269-A), one count of income tax evasion (Count 3 of Criminal No. 82-269-A), two counts of false staement (Count 5 of Criminal No. 82-269-A and Count 1 of Criminal No. 83-11-A) and two counts of obstruction of justice (Counts 2 and 3 of Criminal No. 83-11-A). He was acquitted of the remaining six counts in the two indictments.

Motions for a new trial and for judgments of acquittal were heard and denied by the Court on April 29, 1983.

Sentencing was held on May 11, 1983, and the aggregate sentence was eight years. A timely notice of appeal followed.

Thereafter, on July 31, 1984, in an unpublished opinion, a panel of the Court of Appeals for the Fourth Circuit affirmed appellant's conviction.

REASONS FOR GRANTING THE WRIT

I.

PETITIONER HAS BEEN DENIED HIS RIGHT TO A FAIR TRIAL AND HIS RIGHT TO CONFRONT HIS ACCUSERS WHERE (1) CRITICAL GOVERNMENT WITNESSES MADE REPEATED REFERENCES TO INADMISSIBLE POLYGRAPH EVIDENCE, (2) THE GOVERNMENT FAILED TO CAUTION THE WITNESS AGAINST MAKING SUCH REFERENCES, AND (3) THE TRIAL COURT DENIED THE DEFENSE REQUEST FOR A MISTRIAL.

There is no question but that in virtually every court in the country, and certainly every Federal Court, evidence that the accused or a witness has taken a polygraph test is inadmissible. *See United States* v. *Holman,* 680 F.2d 1340, 1351-1352 (11th Cir. 1982). Indeed, the Fourth Circuit Court of Appeals acknowledged that principle in a case decided the same week as this one and held that repeated references to a polygraph examination warranted a new trial, *United States* v. *Brevard,* 739 F.2d 180 (4th Cir. 1984).

Petitioner's panel reached a different result, relying primarily on the fact that after each improper reference the trial court gave immediate cautionary instructions to

the jury. But, in the words of the *Brevard* panel, "[c]urative instructions, however, are not always adequate. There are instances where the jury is exposed to inadmissible evidence which could make such a strong impression that instructions to disregard it may not remove its prejudicial effect. 739 F.2d 182 (citing *Bruton* v. *United States,* 391 U.S. 123 (1968)).

This is a case where no cautionary instruction could eradicate the prejudice petitioner suffered by virtue of the testimony of two government witnesses. Moreover, in a situation where the government itself must ultimately be held responsible for the actions of its witnesses, in light of the government's failure to instruct the witnesses not to refer to the prejudicial evidence, it is particularly inappropriate that petitioner be denied his request that he be granted a trial untainted by references to inadmissible evidence. As things stood for petitioner after the repeated references to inadmissible evidence, he had the worst of both worlds: A jury clearly cognizant of the outcome of Stout's polygraph examination, and yet no opportunity to challenge the reliability of the examination.

The Constitution demands more.

CONCLUSION

For the foregoing reaons, it is respectfully submitted that this petition be granted.

Respectfully submitted,

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September 28, 1984

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for a Writ of Certiorari has been served by mail upon the Honorable Rex E. Lee, Solicitor General, Department of Jsutice, Washington, D.C. 20530, and upon Michael W. Farrell, Esq., Chief, Appellate Division, United States Attorney's Office for the District of Columbia, this 28th day of September 1984.

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Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[Unpublished]

No. 83-5122

United States of America,

Appellee,

v.

H. Edward Tickel, Jr.,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. James C. Cacheris, District Judge. (CR 82-00269A; and 83-00011-A)

Argued: April 6, 1984 Decided July 31, 1984

Before WINTER, Chief Judge, HALL and PHILLIPS, Circuit Judges.

W. Gary Kohlman (Kenneth M. Robinson on brief) for Appellant; Terence J. Keeney, Assistant United States Attorney (Elsie L. Munsell, United States Attorney for the Eastern District of Virginia; Joseph E. Digenova, United States Attorney for the District of Columbia; Michael W. Farrell, John P. Hume, Assistant United States Attorneys on brief) for Appellee.

PER CURIAM:

Defendant, a special agent of the F.B.I., was convicted of interstate transportation of stolen property, tax evasion, obstruction of justice, and false statements arising from the theft of diamonds and jewelry from a traveling jewelry salesman in Lexington, North Carolina. Defendant appeals asserting numerous grounds of reversible error, none of which we think are meritorious. We affirm.

We see no abuse of discretion in the denial of a one-day continuance to enable defendant's out of state lawyer to be present at selection of the jury. The district court had already delayed the trial three times to accommodate out of state counsel. Two local lawyers were present for selection of the jury and opening statements were delayed until the out of state lawyer was present. Indeed when the third continuance was granted, local counsel represented that further delays would be unnecessary and jury selection could proceed thereafter even without out of state counsel.

In our view defendant's right to effective assistance of counsel was not infringed when only one, but not both, of defendant's trial counsel was granted security clearance to discuss with defendant aspects of his defense that might pertain to national security. The record reflects no prejudice to defendant nor is there reason to doubt the competence of the lawyer to whom clearance was given.

Defendant also contends that this case should have been joined with one against him pending in the District of Columbia. Defendant, however, made no motion for joinder in the district court for the Eastern District of Virginia so that the issue is not before us.

Two witnesses testified on cross examination that the salesman who was robbed has passed a polygraph exami-

nation. The record suggests that defense counsel intentionally elicited this information. Of course the evidence was inadmissible but we do not think that reversible error was committed. In each instance the district court gave a prompt unequivocal curative instruction and we think that the errors were effectively cured. *See* United States v. Smith, 565 F.2d 292, 294-95 (4 Cir. 1977).

Similarly two witnesses, employees of the Internal Revenue Service whose testimony was crucial to defendant's conviction, were seen conversing together during a recess in violation of the district court's sequestration order. When the occurrence was made known to the district court, it permitted defendant to cross examine the witnesses about their conversation and it instructed the jury to consider the conversation in determining the credibility of each witness. We think that the district court acted within its discretion when it concluded to let these witnesses testify with this corrective action. We reject the argument that it was reversible error not to strike or exclude the entire testimony of the two witnesses.

We see no need to detail all of the evidence but we are satisfied from our study of the record that the evidence was legally sufficient to support defendant's conviction for obstruction of justice and for knowingly and willfully making a false statement in a matter within the jurisdiction of the F.B.I.

Finally, we see no plain error in the prosecutor's closing argument about the weight to be given to defendant's character witnesses. Defendant made no objection to the argument when it was made nor did he request a curative instruction. *See* United States v. Polytarides, 584 F.2d 1350, 1354 (4 Cir. 1976). It was not a savage character attack, but a brief and well chosen argument that very bad people (Judas Iscariot and Benedict Arnold) can have very good

people for friends. Furthermore, the alleged impropriety comprised only a small portion of the entire closing argument; involving only two paragraphs in 92 transcript pages of argument.

AFFIRMED.